(21,221)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 172.

A. GUION JENNINGS, PLAINTIFF IN ERROR,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1910.

1 In the Court of Appeals of the District of Columbia, January Term, 1908.

No. 1869.

A. GUION JENNINGS, Appellant,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

Stipulation.

It is hereby stipulated by and between counsel for the appellant and appellee that the transcript of record in the above entitled cause contains the following entries which correctly set forth all of the proceedings therein in the Supreme Court of the District of Columbia subsequent to the rendition of the verdict, and the dates thereof, viz:

1907.
Dec. 4. Verdict for defendant.
9. Motion for new trial filed and entered.
20. Session resumed pursuant to adjournment, Mr. Justice Wright presiding.
20. Motion for new trial overruled and judgment for defendant for costs.
20. Appeal to Court of Appeals by plaintiff's order.
20. Citation, writ of, issued.
20. Citation, writ of, returned, service accepted.
1908.
Jan. 10. Bond on appeal to Court of Appeals, approved and filed.
14. Session resumed pursuant to adjournment, Mr. Justice Wright presiding.
14. (In pursuance of Common Law Rule No. 55 counsel for the appellee was present having received the eight day notice together with a copy of appellant's proposed bill of exceptions required by said rule. The proposed bill of exceptions was submitted to the Court by counsel for the appellant in the presence of and without objection from counsel for the appellee.)
Feb. 11. Session of the Court resumed pursuant to adjournment. Mr. Justice Wright presiding.
11. Bill of exceptions signed and filed now for then.
11. Order for record by plaintiff filed.
21. Transcript of record filed in Court of Appeals.

E. HILTON JACKSON,
Attorney for Appellant.
McKENNEY & FLANNERY,
Attorneys for Appellee.

(Endorsed:) No. 1869. In the Court of Appeals of the District of Columbia. January Term, 1908. A. Guion Jennings, Appellant, vs. The Philadelphia, Baltimore and Washington Railroad Company. Stipulation. Court of Appeals, District of Columbia. Filed Mar. 17, 1908. Henry W. Hodges, Clerk.

2 In the Court of Appeals of the District of Columbia, January Term, 1908.

No. 1869.

A. GUION JENNINGS, Appellant,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

Motion to Strike Out Bill of Exceptions and Affirm Judgment.

And now comes the appellee, by its counsel of record, and moves the Court to strike from the transcript of the record in the above entitled cause the bill of exceptions and to affirm the judgment of the Court below, upon the grounds following, to wit:

1. Because the judgment in the Court below was entered at the October Term of the Supreme Court of the District of Columbia, to wit, on the 20th day of December, 1907; no order was made prolonging said term for the purpose of settling the bill of exceptions as required by section 2 of Rule 54 of said Supreme Court; said bill of exceptions was not submitted until after the beginning of the January Term, to wit, January 14, 1908, and was not signed by the Court until February 11, 1908, long after the expiration of said October Term.

2. Because the Court below in this case was without jurisdiction to sign the bill of exceptions after the expiration of the term at which the judgment was entered.

3. Because said bill of exceptions contains the statement of all the errors of law relied upon by the appellant and if it should be stricken from the record, the judgment appealed from should be affirmed.

McKENNEY & FLANNERY,
Attorneys for Appellee.

3

MARCH 13TH, 1908.

To Messrs. Henry E. Davis and E. Hilton Jackson, Attorneys for Appellant:

Please take notice that we shall submit to the Court of Appeals of the District of Columbia the above motion to strike out the bill of exceptions and affirm the judgment of the Court below, on Tuesday, March 17th, 1908, at the opening of Court on that day, or as soon thereafter as counsel can be heard.

McKENNEY & FLANNERY,
Attorneys for Appellee.

Service of the foregoing motion and notice, by receipt of a copy thereof, acknowledged this 13th day of March, A. D. 1908.

E. HILTON JACKSON,
Attorney for Appellant.

(Endorsed:) No. 1869. In the Court of Appeals of the District of Columbia. January Term, 1908. A. Guion Jennings, Appellant, vs. The Philadelphia, Baltimore and Washington Railroad Company. Motion to strike out Bill of Exceptions and affirm judgment. Filed Mar. 17, 1908. Henry W. Hodges, Clerk.

4 No. 1869.

A. GUION JENNINGS, Appellant,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

Opinion.

Mr. Chief Justice Shepard delivered the opinion of the Court:

The appellee has filed a motion to strike the bill of exceptions from the transcript of record in this case and to affirm the judgment.

The facts, as shown by the stipulation of the parties, are that the verdict for the defendant was entered in the court below on December 4, 1907; motion for a new trial was overruled and judgment for defendant for costs entered December 20, 1907. The term ended on the 31st day of December, and a new term began in January. On January 10, 1908, an appeal bond was approved and filed. On January 14th the appellant, having given eight days' notice in compliance with rule 55 of the Supreme Court of the District of Columbia, accompanied by a copy of his proposed bill of exceptions, presented the said bill to the court for settlement. The facts in regard to this presentation are recited as follows in the stipulation:

"In pursuance of common law rule No. 55, counsel for the appellee was present, having received the eight days' notice together with a copy of appellant's proposed bill of exceptions required by said rule. The proposed bill of exceptions was submitted to the court by counsel for the appellant in the presence of and without objection from counsel for the appellee."

On February 11th the bill of exceptions was signed by the trial judge and filed now for then.

The common law rule that a bill of exceptions must be settled before the regular close of the term has been changed by section 2 of common law rule 54 of the Supreme Court of the District of Columbia, which provides as follows:

"The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in the case of a trial begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions."

Common law rule 55, in accordance with which notice was given to appellee of the intention to present the bill of exceptions, provides generally that every bill shall be prepared and submitted to the counsel on the other side; if not settled before the jury retires, notice shall be given to opposing counsel of the time at which it is proposed the bill of exceptions shall be settled, and shall, at least eight days, exclusive of Sundays, before the time designated in such notice, submit to the opposing counsel the bill of exceptions so proposed to be settled, and the said exception shall be presented to the court within thirty-eight days, exclusive of Sundays, after judgment shall have been entered therein, unless the trial justice shall, for good cause shown, extend the time for the presentation thereof, etc.

Rule 55 was not intended to affect the operation of rule 54. Its purpose is to secure the fair settlement of a delayed bill of exceptions by requiring the delivery of a copy of the proposed bill *of* to the opposing party with notice of the time of its intended submission to the trial justice for its settlement. It operates within the term during which the trial was had, and within the term of its prolongation when made in accordance with the provision of section 2 of rule 54. Whether the permission to the trial justice to further extend the term for presentation of the bill, given by rule 55 would be available after the expiration of the trial term, is a question that does not arise in this case.

When a bill is presented without the notice required, but within the term, the trial justice may nevertheless settle it. Lindsey v. Pennsylvaina R. Co., 26 App. D. C., 125. But he is not compelled to do so. Johnson-Wynne Co. v. Wright, 28 App. D. C., 375. If the bill is presented and settled after the expiration of the time permitted, it will not be considered. Talty v. D. C., 20 App. D. C., 489.

5 It seems that a bill of exceptions in an ordinary civil case may be settled after the expiration of the time permitted by the rules, if the opposing counsel consents thereto.

It is contended that the facts recited in the stipulation show such a consent. We do not concur in this view. When given notice of the intention to submit the bill of exceptions, the counsel for the appellee appeared. The facts do not show that he consented to the settlement of the bill of exceptions, but simply that he made no objection thereto. He was not called upon to give his express consent, and his failure to state at the time that he objected to the settlement of the bill because the time therefor had elapsed was not the equivalent of such an express consent. Nothing less than an express consent evidenced either by stipulation to that effect, or by the certificate of the trial justice that he had given his consent will be sufficient. It would be an unsafe practice to permit a bill of exceptions to be settled under such circumstances. It is true that the parties have agreed in this case to the fact that no objection was made. But the fact that none was made would be equally effective if shown to be true, in a case where the fact might be controverted. This would lead to the introduction of affidavits in regard to what may have occurred in the presentation of the bill, and to the raising of new

issues not contemplated in an appellate tribunal. Talty v. D. C., 20 App. D. C., 489, 493.

It follows that the motion to strike the bill of exceptions from the record is well taken and must be granted. There being nothing in the record on which error can be assigned without a bill of exceptions, the judgment must be affirmed with costs. Affirmed.

6 Tuesday, March 31st, A. D. 1908.

No. 1869. January Term, 1908.

A. Guion Jennings, Appellant,
vs.
Philadelphia, Baltimore and Washington Railway Company.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and on a motion to strike out the bill of exceptions and affirm the judgment, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the bill of exceptions be, and the same is hereby, stricken from the record and that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. Chief Justice SHEPARD.

March 31, 1908.

7 United States of America, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between A. Guion Jennings, Appellant, and Philadelphia, Baltimore and Washington Railway Company, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 14th day of April, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

—— ——,

—— ——.

8 (*Bond on Writ of Error.*)

Know all men by these presents, that we, A. Guion Jennings, as principal, and Fidelity and Deposit Company of Md. as surety, are held and firmly bound unto Philadelphia, Baltimore and Washington Railway Company in the full and just sum of Three Hundred Dollars ($300) to be paid to the said Philadelphia, Baltimore & Washington Railway Company — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13" day of May, in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between A. Guion Jennings vs. Philadelphia, Baltimore and Washington Railway Company, a judgment was rendered against the said A. Guion Jennings and the said A. Guion Jennings having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Philadelphia, Baltimore and Washington Railway Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said A. Guion Jennings shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

A. G. JENNINGS. [SEAL.]

FIDELITY & DEPOSIT CO.
OF MARYLAND. [SEAL.]

By W. H. RONSAVILLE. [SEAL.]
Attorney in Fact.

[Seal Fidelity & Deposit Company of Maryland.]

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

9 [Endorsed:] No. 1869. A. Guion Jennings, appellant, vs. Philadelphia, Baltimore and Washington Railway Company. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 19, 1908. Henry W. Hodges, clerk.

10 UNITED STATES OF AMERICA, *ss:*

To Philadelphia, Baltimore and Washington Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein A. Guion Jennings is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of May, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 19th day of May, 1908.
McKENNEY & FLANNERY,
For P., B. & W. R. R. Co.

11 [Endorsed:] Court of Appeals, District of Columbia. Filed May 19, 1908. Henry W. Hodges, Clerk.

12 Court of Appeals of the District of Columbia, January Term, 1908.

No. 1869.

A. GUION JENNINGS, Appellant,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

The Clerk in preparing the transcript of this cause for the Supreme Court of the United States will include the following papers and documents and no others.

1. Stipulation of counsel filed March 17th, 1908.
2. Motion to strike out bill of exceptions, filed March 17th, 1908.
3. Judgment of Court of Appeals filed March 31st, 1908.
4. Opinion of Court of Appeals and this order.
5. Citation, Writ of Error and Bond.

E. HILTON JACKSON,
Attorney for the Appellant.

(Endorsed:) No. 1869. Court of Appeals of the District of Columbia. Jennings vs. Phila. Balto. & Wash. Ry. Co. Order for Transcript of Record. Court of Appeals, District of Columbia. Filed May 25, 1908. Henry W. Hodges, Clerk.

13 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive contain a true copy of the records and proceedings of said Court of Appeals, as designated by counsel for the Plaintiff in Error in the case of A. Guion Jennings, Appellant, vs. Philadelphia, Baltimore and Washington Railway Company. No. 1869, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of May, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,221. District of Columbia Court of Appeals. Term No. 172. A. Guion Jennings, plaintiff in error, vs. Philadelphia, Baltimore & Washington Railway Company. Filed June 10th, 1908. File No. 21,221.

Office Supreme Court, U. S.
FILED.
APR 26 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. [redacted]10.

A. GUION JENNINGS, PLAINTIFF IN ERROR,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

I, E. Hilton Jackson, being first duly sworn, depose and say that I am the attorney of record in the above-entitled cause, and as such filed on behalf of the plaintiff the declaration herein in the Supreme Court of the District of Columbia, at law, No. 47411; that the plaintiff's cause of action as set forth therein is for damages on account of personal injuries alleged to have been received by plaintiff by reason of the negligence of the defendant; that the amount of damages laid and claimed is the sum of ten thousand ($10,000) dollars.

E. HILTON JACKSON.

Subscribed and sworn to before me this 26th day of April, A. D. 1910.

C. ELTON JAMES,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 172.

A. GUION JENNINGS

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

This is an appeal from an order of the Court of Appeals of the District of Columbia striking from the record the bill of exceptions from the transcript of record in this cause and affirming the judgment of the Supreme Court of the District of Columbia entered upon the verdict of the jury directed by the trial justice in said court.

The facts of the case, together with the rules of the Supreme Court of the District of Columbia, an interpretation of which is involved herein, are clearly and succinctly set

forth on page 174 of the opinion of the Court of Appeals in this cause (*Jennings vs. Railway Company*, 31 App. D. C., 174), and are as follows:

> "The facts as shown by the stipulation of the parties are that the verdict for the defendant was entered in the court below on December 4, 1907; motion for a new trial was overruled, and judgment for defendant for costs entered, December 20, 1907. The term ended on the 31st day of December, and a new term began in January. On January 10, 1908, an appeal bond was approved and filed. On January 14th, the appellant, A. Guion Jennings, having given eight days' notice in compliance with rule 55 of the Supreme Court of the District of Columbia, accompanied by a copy of his proposed bill of exceptions, presented the said bill to the court for settlement. The facts in regard to this presentation are recited as follows in the stipulation:
>
> "In pursuance of common-law rule No. 55, counsel for the appellee was present, having received the eight days' notice together with a copy of appellant's proposed bill of exceptions required by said rule. The proposed bill of exceptions was submitted to the court by counsel for the appellant in the presence of and without objection from counsel for the appellee."
>
> "On February 11th the bill of exceptions was signed by the trial judge and filed now for then.
>
> "The common-law rule that a bill of exceptions must be settled before the regular close of the term has been changed by sec. 2 of common-law rule 54 of the Supreme Court of the District of Columbia, which provides as follows: 'The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in the case of a trial begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion, in order to prepare a bill of exceptions.'
>
> "Common-law rule 55, in accordance with which notice was given to appellee of the intention to pre-

sent the bill of exceptions, provides generally that every bill shall be prepared and submitted to the counsel on the other side: if not settled before the jury retires, notice shall be given to opposing counsel of the time at which it is proposed the bill of exceptions shall be settled, and shall, at least eight days, exclusive of Sundays, before the time designated in such notice, submit to the opposing counsel the bill of exceptions so proposed to be settled, and the said exceptions shall be presented to the court within thirty-eight days, exclusive of Sundays, after judgment shall have been entered therein, unless the trial justice shall, for good cause shown, extend the time for the presentation thereof, etc."

Assignment of Error.

The court erred:

1. In striking the bill of exceptions from the record.

2. In affirming the judgment of the Supreme Court of the District of Columbia.

Brief and Authorities.

It is conceded that had counsel for the defendant in error appeared on January 14, 1908, and objected to the signing of the said bill of exceptions it would have been the duty of the court to refuse to settle same.

The sole question presented for the determination of this court is as to whether the facts cited above constitute in law consent. The contention of the defendant in error is that this consent to be effective must be *express*, whereas the plaintiff in error contends that this consent may be effective though *implied*. In this connection it may be recalled that the only exception the plaintiff in error relies upon is the action of the trial court in directing a verdict for the defendant.

In a note on page 312, 6th Law Ed. of the United States Supreme Court Reports, the case of Strader *vs.* Alexander, 9 Port., 444, is cited as holding that a bill of exceptions could not be objected to because not signed and sealed during the term, if exception was taken at the trial and noted by the judge and voluntarily sealed by him afterwards; and the case of Pool *vs.* Cahawba, etc., R. Co., 5 Ala., 238, is cited as following this case. A *fortiori* where notice is given to opposing counsel, as in the present case, pursuant to the rule of the trial court as to the time when the bill of exceptions will be presented, and said counsel appears in court in response to said notice and agrees upon the form of the bill as it was finally signed by the court, a very different situation is presented.

The Court of Appeals in Jennings *vs.* R. R. Co., 31 App D. C., 176, relies primarily upon the case of Talty *vs.* District of Columbia, 20 App., 489.

It is not admitted that this is an authority in support of contention of defendant in error. In that case no notice was given or required by the rule prior to the presentation of the bill of exceptions for settling. The case is not parallel, therefore, in that no consent could be said to have been given by the opposite party to the settling of the same after the expiration of the time required by rule 25 of the Court of Appeals of the District of Columbia. Besides, the rule to be observed in making out and filing bills in criminal cases is less elastic than has been, and still is not so liberal as that prescribed in civil cases.

All authorities establish the proposition that a bill of exceptions may be settled after the expiration of the time permitted by the rules if the opposing counsel consents thereto, and, it is submitted, the authorities do not justify the conclusion that this consent must be express.

The case of Michigan Ins. Bank *vs.* Eldred, 143 U. S., 298, would seem to cover the very situation existing under the stipulation presented to the court herein:

> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, *or by consent of parties;* and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term."

In the case of Ward *vs.* Cochran, 150 U. S., 603, the court uses the following language:

> "As early as Walton *vs.* U. S., 9 Wheaton, 651, the power to reduce exceptions taken at the trial * * * and to have them signed and filed was, under the ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true one and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, etc."
>
> See also United States *vs.* Jones, 149 U. S., 262.

Appellee may waive his right to have the bill of exceptions presented within the time required by law (3 Enc. Pl. and Pr., 476).

> "The court, upon consideration of the question presented * * * held that the objection of the provisions of the statutes requiring the party alleging exceptions to file them with the clerk giving notice thereof to the adverse party and present them to the judge, within the time extended or allowed as prescribed by statute, is to protect the adverse party and the presiding judge from being compelled to examine the truth of exceptions of which they have no notice until after the time has expired; but not to prevent the judge from afterwards allowing the exceptions, if

he is satisfied of their conformity with the truth, and sees fit to do so and the adverse party consents to such allowance."

Walker *vs.* Moors, 122 Mass., 511.

"Where a defendant in error moves to set aside a writ of error and bill of exceptions for irregularity not noting the bill of exceptions for settlement within the time required by the rules of the court, he will be defeated, where the plaintiff in error shows that the defendant in error consented or *did not object to* going before a judge for settlement, after the time had expired."

Keefer *vs.* Keefer, How. Pr. (N. Y.), 67.

A bill of exceptions is not necessarily a nullity because filed after the expiration of the time allowed by law. The objection may be waived by the appellee, and he will be deemed to waive it where he fails to make a proper and timely objection.

Lotz *vs.* Briggs, 50 Ind., 346.

Murphy *vs.* Cunningham, 1 Colo., 467.

Drake *vs.* Dodsworth, 4 Kan., 168.

It is, therefore, respectfully submitted that it was error to strike out the bill of exceptions from the record and to affirm the judgment of the Supreme Court of the District of Columbia.

HENRY E. DAVIS,
E. HILTON JACKSON,
Counsel for the Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 172.

A. GUION JENNINGS, PLAINTIFF IN ERROR,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This cause was heard in the Court of Appeals of the District of Columbia on the motion of attorneys for the Philadelphia, Baltimore and Washington Railroad Company to strike from the transcript of the record on file in that court the bill of exceptions which had been settled and signed by the justice of the Supreme Court of the District of Columbia who had presided at the trial of the cause.

The motion to strike out was based upon the fact that the bill of exceptions had been both submitted to and settled by

the trial court after the expiration of the term at which the trial had been had, and no order prolonging the trial term of the court for the purpose of settling the bill of exceptions had been either asked for by counsel or passed by the trial court as provided for and required by section 2 of rule 54 of the Rules of Practice of the Supreme Court of the District of Columbia; and it was suggested in and by the motion that under such circumstances the trial court was without jurisdiction to settle and sign any bill of exceptions, and that in the absence of a bill of exceptions the judgment of the trial court must necessarily be affirmed (R., 2).

Upon consideration of this motion, which was argued by counsel for the respective parties, the Court of Appeals of the District of Columbia adjudged that the bill of exceptions should be stricken from the record and that the judgment of the Supreme Court of the District of Columbia, being the trial court, should be affirmed with costs (R., 5).

The opinion of the Court of Appeals, which was by the Chief Justice of that court, and which abundantly discloses the reasons and grounds for the court's action in the cause, will be found at page 3 *et seq.* of the transcript of record before this court.

The motion in the Court of Appeals was heard upon a stipulation between the counsel for the respective parties setting out certain dates and entries of record in the trial court. This stipulation appears at page 1 of the transcript before this court and contains all that there is before this court concerning the case as it was in the Supreme Court of the District of Columbia.

The pertinent provisions of the Code of Law for the District of Columbia, enacted March 3, 1891 (31 Stats. L. 1189, 1199) are as follows:

SUBCHAPTER THREE.

Supreme Court of the District of Columbia.

* * * * * * *

SEC. 63. *Terms.* The said court shall hold a general term and special terms. The general term shall be held by at least three justices and each special term by a single justice.

SEC. 64. The special terms of said court shall be known, respectively, as the circuit court, the equity court, the criminal court, the probate court, and the district court of the United States.

SEC. 65. The general term of said court shall be open at all times for the transaction of business; and said court, by orders passed in general term, may regulate the periods of holding the special terms, fix the number of said terms, and alter the same from time to time as public convenience may require: * * *

SEC. 66. All causes in said court shall be heard and determined in special term. And the several terms are declared to be terms of the supreme court, and the judgments, decrees, sentences, orders, proceedings, and acts of said several terms shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of the supreme court.

* * * * * * *

SEC. 73. *Bill of Exceptions.*—If, upon a trial of a cause before a jury, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice and afterwards settled in such [a] manner as may be provided by the rules of the court and stated in a bill of exceptions, with so much of the substance of the evidence as may be material to the questions to be raised, and said bill of exceptions need not be sealed, and shall be considered a part of the record in case of an appeal from the final judgment rendered in the case.

The pertinent Rules of Practice of the Supreme Court of the District of Columbia in force at the time of the trial

of this case in that court and also in force both at the date of the signing of the bill of exceptions in question, and at the date of the judgment of the Circuit Court of Appeals which the pending writ of error seeks to bring in review before this court, were as follows:

COMMON LAW RULES.

* * * * * * *

"3. The terms of the Court shall be held as follows: * * *

Of the circuit court on the—

First Tuesday of January.
First Tuesday of April.
First Tuesday in October.

* * * * * * *

Each term shall continue until the commencement of the next succeeding term.

EXCEPTIONS.

54. If a party desires to present for review in the Court of Appeals the rulings or instructions of the presiding justice for alleged errors of law, he must, at the trial, and before the jury retire to consider their verdict, except to such rulings or instructions; and he may at the time of taking exception, reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes and proceed with the trial, and afterwards settle the bill of exceptions.

SEC. 2. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term, but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions.

RULE 55. Every bill of exceptions shall be prepared by the counsel of the party tendering it and submitted to the counsel on the other side; and where

a bill of exceptions is not settled before the jury retires, the counsel tendering it shall give notice in writing to the opposing counsel of the time at which it is proposed the bill of exceptions shall be settled, and shall also, at least eight days, exclusive of Sundays, before the time designated in such notice, submit to the opposing counsel the bill of exceptions so proposed to be settled, and the said exceptions shall be presented to the court within thirty-eight days, exclusive of Sundays, after judgment shall have been entered therein, unless the trial justice shall, for good cause shown, extend the time for the presentation thereof, and if the counsel cannot agree, it shall be settled by the justice who presided at the trial; and in that case the justice shall be attended by the counsel on both sides, as he may direct. *Provided, however*, that all motions in arrest of judgment and for a new trial shall be submitted to the trial justice within fifteen days, exclusive of Sundays and legal holidays, from the date of the verdict, unless the time shall be extended by him for good cause shown. And if said motions shall not be submitted within said fifteen days, or the time extended as aforesaid, the same shall be deemed overruled by force of this rule, without any order, and judgment entered accordingly."

By the stipulation of counsel (R., 1) it appears that the trial of this cause was held during the October, 1907, term of the Supreme Court of the District of Columbia.

December 4, 1907, the jury returned its verdict for the defendant and a motion for new trial having been overruled judgment for defendant for costs was duly entered December 20, 1907.

No order prolonging the term having been entered the term itself by force of the above rules of practice expired January 6, 1908.

January 14, 1908, a proposed bill of exceptions was submitted to the trial court by counsel for Jennings in the presence of and without objection from counsel for the defendant company.

February 11, 1908, this bill of exceptions was signed *nunc pro tunc.*

The Court of Appeals following precedent (Talty *vs.* District of Columbia, 20 App. D. C., 489), held that, as the bill of exceptions had been both presented to and settled by the trial court after the time permitted by the rules of practice of that court, it could not be considered (R., 4), and that the motion to strike the bill of exceptions from the record was "well taken and must be granted. There being nothing in the record on which error can be assigned without a bill of exceptions, the judgment must be affirmed with costs," and it was so ordered (R., 5).

ARGUMENT.

In view of the facts thus narrated and upon the record before this court the writ of error should be dismissed for want of jurisdiction in this court to entertain it.

Section 233 of the Code of Law for the District of Columbia (31 Stats. L., 1189, 1227) is as follows:

SUBCHAPTER FIVE.

The Supreme Court of the United States.

"SEC. 233. Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without re-

gard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

It does not appear that the matter in dispute, exclusive of costs or otherwise, exceeds the sum of five thousand dollars, nor indeed that there was any sum or amount or value whatever in dispute.

Certainly the motion to strike out the bill of exceptions, which was the only matter passed upon by the Court of Appeals, did not depend upon or involve any sum or value, nor did it necessarily embrace any dispute or controversy concerning any sum or amount which could be reckoned in money.

First National Bank *vs.* Hughes, 106 U. S., 523.
Cross *vs.* Burke, 146 U. S., 82.
Perrine *vs.* Slack, 164 U. S., 452.

Respectfully submitted.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
WILLIAM HITZ,
Attorneys for Defendant in Error.

JENNINGS *v.* PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 10. Submitted April 26, 1910.—Decided October 31, 1910.

In the absence of an extending order the trial court loses control of the case after the term has been closed and an appeal has been allowed and perfected; and common law rule 55 of the Supreme Court of the District of Columbia allowing thirty-eight days to file a bill of exceptions applies only so long as the judgment term is running and does not operate to extend the power of the trial judge over the record beyond the term.

Grave matters of procedure such as the allowance of a bill of exceptions after close of the term should not rest on mere implication of consent.

A proceeding at the instance of one party to the record cannot be regarded as by consent simply because the other party has notice and does not object; the latter, if he does nothing to prejudice the rights of others, may sit silent and still object that the proceeding is *coram non judice*.

31 App. D. C. 173, affirmed.

THE facts are stated in the opinion.

Mr. Henry E. Davis and *Mr. E. Hilton Jackson* for plaintiff in error.

Mr. Frederic D. McKenney, Mr. John Spalding Flannery and *Mr. William Hitz* for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This case turns primarily upon the question of whether the Supreme Court of the District exceeded its jurisdic-

tion in allowing a bill of exceptions after the close of the term at which the judgment sought to be reversed had become final. The judgment was rendered on December 20, 1907. The term closed December 31, and a new term began on January 1, 1908. On January 10, 1908, an appeal bond was approved and filed. On January 14, the appellant, having given eight days' notice, under rule 55 of the court, presented a bill of exceptions to the court for allowance. The stipulation in respect of this recites: "In pursuance of common law rule No. 55 counsel for the appellee was present, having received the eight-day notice, together with a copy of appellant's proposed bill of exceptions required by said rule. The proposed bill of exceptions was submitted to the court by counsel for the appellant in the presence of and without objection from counsel for the appellee."

Common law rule 55, under which the appellant claimed the right to have his bill of exceptions filed within thirty-eight days after the rendition of the judgment, was applicable only so long as the judgment term was running and did not operate to extend the power of the trial judge over the record beyond the term. No order had been made in term time for the filing of such a delayed bill. Not only had the term closed, but an appeal had been allowed and perfected. The trial court had thereby lost control of the cause, and had no authority to add to or take from the record.

In *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298, this court said:

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circum-

stances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

See also *Morse* v. *Anderson*, 150 U. S. 156; *Muller* v. *Ehlers*, 91 U. S. 249; *Merchants' Insurance Co.* v. *Buckner*, C. C. A., 6th Cir., 98 Fed. Rep. 222.

But it is urged that if the appellee consented that an order might be entered *nunc pro tunc*, permitting the filing and allowance of a bill of exceptions, such consent should be given the force of an order in term or a rule of court. But if this be granted, the order in this case does not profess to have been founded upon consent. The stipulation recites that the proposed bill was presented to the court "in the presence of and without objection from counsel for the appellee."

The proceeding was *coram non judice*. Appellee was not in court or before a court. The judge and the court had lost all power over the cause, the parties and the record. The appellant was pretending to proceed under rule 55. The appellee might well sit silent and let the matter rest upon the claim; it was not asked to say whether it consented. A different case might arise if, by its failure to object, the appellant had been misled to his injury. But there was nothing left undone which might have been done and nothing done to his prejudice. The plain question was, Did the court have power under rule 55, or under any order of the court or controlling practice, to allow a bill of exceptions after the close of the term? The appellee might fairly say nothing.

So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost

all judicial power over the record should not rest upon a mere implication from silence. There should be express consent, or conduct which should equitably estop the opposite party from denying that he had consented. There was nothing of that kind in this case, and the judgment of the Court of Appeals must be

Affirmed.